

EXHIBIT #34
TO
DEYOUNG DECLARATION

WILMERHALE

January 26, 2007

Kyle M. DeYoung

By Certified U.S. Mail and Facsimile

Office of the General Counsel
Department of Homeland Security
Washington, D.C. 20528

+1 202 663 6785 (t)
+1 202 663 6363 (f)
kyle.deyoung@wilmerhale.com

Re: *Freedom of Information Act Appeal: Case DHS/OS/PRIV 06-527/Ronis*

Dear Office of the General Counsel:

On April 25, 2006 Amnesty International USA^{1/} ("Amnesty") and Washington Square Legal Services ("WSLS") filed two requests for information under the Freedom of Information Act ("FOIA") regarding detainees secretly transferred or held by the United States Government, including (but not limited to) information, reports and memoranda regarding "Ghost Detainees/Prisoners," "Unregistered Detainees/Prisoners" and "CIA Detainees/Prisoners" ("the Requests").

Your agency, the Department of Homeland Security, Office of Policy ("Office of Policy" or "Directorate for Policy")^{2/} responded to the Requests on May 3, 2006, aggregated our Requests and assigned them case number DHS/OS/PO 06-527 and denied our requests for expedited processing. We appealed this determination on July 3, 2006, and you acknowledged receipt of our appeal by letter on July 18, 2006.^{3/} On November 28, 2006, your agency determined that it possessed no records responsive to our Requests. Copies of the Requests and your response letters are attached. See Exhibits A through F.

Pursuant to 5 U.S.C. §552(a)(6), Amnesty and WSLS hereby appeal the adequacy of the Office of Policy's search for relevant documents. Under FOIA, an agency must conduct a "thorough search" for responsive documents and demonstrate that its search was "reasonably calculated to uncover all relevant documents."^{4/}

^{1/}Amnesty International USA is the U.S. Section of Amnesty International. See <http://www.amnestyusa.org/about/>.

^{2/} Given that the Directorate for Policy website as well as response letters that we have received from this agency identify the agency both as the Directorate for Policy and the Office of Policy, for purposes of this appeal both names will be used interchangeably.

^{3/} Your July 18, 2006 response to our appeal assigned our expedited processing appeal #06-129, and your final November 28, 2006 no-records determination designated DHS/OS/PRIV 06-527 as our case number. For purposes of this no-records appeal we construe DHS/OS/PRIV 06-527 as the file number.

^{4/} *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994); see also *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

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The November 28, 2006 letter does not provide any information about your search methods or indicate that your agency even conducted a search pursuant to the scope of both of the Requests. Your reply states that we requested "several records pertaining to detainees," and that the Office of Policy, "using the search criteria [Amnesty and WSLS] specified, did not produce any responsive records." However, while the Requests adequately described the information and documents sought, they did not contain any specific list of search criteria. Accordingly, the Office of Policy has not shown that it conducted a search "reasonably calculated to uncover all relevant documents" sought by the Requests as required by FOIA.⁵¹

As noted in the Requests, there have been numerous reports of detainees secretly transferred or held by the United States Government, including "Ghost Detainees/Prisoners," "Unregistered Detainees/Prisoners" and "CIA Detainees/Prisoners."⁶¹ Since the Requests were

⁵¹ "The fundamental principle animating FOIA is public access to government documents. Accordingly, [courts] require[] agencies to make more than perfunctory searches and, . . . to follow through on obvious leads to discover requested documents. An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999).

⁶¹ See Josh White, Army, CIA Agreed on 'Ghost' Prisoners, Wash. Post, Mar. 11, 2005, at A16. See also Dana Priest, Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in Rendition, Wash. Post., Dec. 4, 2005; Brian Ross and Richard Esposito, Exclusive: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons, ABC News, Dec. 5, 2005, at <http://abcnews.go.com/WNT/Investigation/story?id=1375123>; Jane Mayer, A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?, New Yorker, Nov. 14, 2005, at 44 (discussing the practice, particularly with respect to the death of Manadel al-Jamadi); Dana Priest, CIA Holds Terror Suspects in Secret Prisons, Wash. Post, Nov. 2, 2005, at A1. See also the following Department of Defense documents released to the American Civil Liberties Union (ACLU) pursuant to a Freedom of Information Act request, all available at <http://www.aclu.org/torturefoia/released/030905/>: Transcript of deposition of Brig. Gen. Janis L. Karpinski, Appendix to Fay/Jones/Kern Report (July 18, 2004); Statement of MNF-I, C2, IMIR CW2, Annex to Fay/Jones/Kern Report (June 16, 2004); Sworn Statement of E-5, 519th MI Bn, Annex to Fay/Jones/Kern Report (June 4, 2004); Sworn Statement of 372nd MP Co SPC, Annex to Fay/Jones/Kern Report (May 7, 2004); Sworn Statement of 372nd MP Co SPC, Annex to Fay/Jones/Kern Report (May 7, 2004); Sworn Statement of [UNREADABLE], Annex to Fay/Jones/Kern Report; Sworn Statement of Deputy CJ2, CJTF-7, Annex to Fay/Jones/Kern Report; Sworn Statement of SGT, 372nd MP, Camp Victory, Annex to Fay/Jones/Kern Report (May 7, 2004); Sworn Statement of SPC/E4, B Co., 66th MI Group, 202nd MI BN, Annex to Fay/Jones/Kern Report (May 24, 2004); Sworn Statement of SGT, Member of GTMO team, "Shut Up Group," Annex to Fay/Jones/Kern Report (June 4, 2004); Sworn Statement of CW2, A/519th MI Bn, Annex to Fay/Jones/Kern Report (May 19, 2004); Sworn Statement of SGT, 372nd MP Co, Annex to Fay/Jones/Kern Report (May 7, 2004); Statement of B/Co, 470th MI Grp. SGT, Annex to Fay/Jones/Kern Report (May 18, 2004). See further Human Rights First, Behind the Wire: An Update to Ending Secret Detentions 6 (2005), available at http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf (providing overview of the practice of ghosting in military facilities); Human Rights Watch, The United States' Disappeared: The CIA's Long-Term "Ghost Detainees" 5-15 (2004), available at <http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf> (outlining practice of keeping CIA prisoners in military detention generally).

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filed, there have been numerous recent additional reports of this practice.⁷⁷ Moreover, on September 6, 2006, President Bush explicitly and specifically acknowledged the existence of the CIA's secret detention program that held and facilitated the interrogation of suspected terrorists in secret locations overseas.⁸⁷ This announcement generated extensive national and international media coverage of the speech and its implications.⁹⁷ For example, bodies responsible for

⁷⁷ See, e.g., Jan Sliva, EU concedes rendition flights took place, *The Herald*, (June 28, 2006); Ike Seamans, Above the law, *The Miami Herald*, (June 25, 2006); MIDDLE EAST: Region still lacks support for torture victims, say observers, *Reuters Foundation*, (June 25, 2006); The Detention Dilemma, *The Washington Post*, (June 19, 2006); Barrie Dunsmore, Ugly portrait emerges dot by dot, *Times Argus*, (June 18, 2006); Josh White, Bad Advice Blamed For Banned Tactics, *The Washington Post*, (June 17, 2006); Anemona Hartocollis, Judges Press CIA Lawyer Over Withheld Documents, *The New York Times*, (June 13, 2006); Court Weighs ACLU Request on CIA Terror Documents, *New York Sun*, (June 13, 2006); Larry Neumeister, Court Urges to Protect CIA Detention Info, *Guardian Unlimited* (June 13, 2006); Euro MP's to Extend Probe Into CIA Activities, *Expatica*, (June 13, 2006); Court Will Investigate Alleged CIA Flights, *Los Angeles Times*, (June 13, 2006); Jeremy Smith, EU Lawmakers Back Report on CIA Terror Kidnappings, *Reuters*, (June 12, 2006); Jan Sliva, Probe of CIA Prisons Implicates EU Nations, *Forbes*, (June 7, 2006); see further Committee on Legal Affairs and Human Rights, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Draft report – Part II (Explanatory memorandum), 7 June 2006; Council of Europe, Parliamentary Assembly, Resolution 1507 Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states (2006). See further Yossi Melman, Marwan Ibrahim Mohammed Jabur, *Haaretz*, Nov. 10, 2006, available at <http://www.haaretz.com/hasen/spages/785673.html> (detailing the recent case of Marwan Ibrahim Mohammed Jabur, a Jordan-born Palestinian who was arrested and interrogated in Pakistan before being sedated and flown to an undisclosed U.S. facility where he was held for almost two years); Mary Louise Kelly, Germany May Charge CIA Officials for Abduction, *National Public Radio Morning Edition*, (Oct. 5, 2006); Sylvia Poggioli, Rendition Trial Opens in Milan; U.S. Agents Absent, *National Public Radio All Things Considered* (Jan. 9, 2007).

⁸⁷ Press Release, Office of the Press Secretary, President Discusses Creation of Military Commissions to Try Suspected Terrorists, Sept. 6, 2006, [hereinafter President Bush Speech Sept. 6, 2006], available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> ("In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency ..."). See also Announcement, Office of the Director of National Intelligence, Summary of the High Value Terrorist Detainee Program, Sept. 6, 2006, available at <http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf>; Announcement, Office of the Director of National Intelligence, Biographies of High Value Terrorist Detainees Transferred to the US Naval Base at Guantánamo Bay, Sept. 6, 2006, available at <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>; and Press Release, The White House, Fact Sheet: Bringing Terrorists to Justice, Sept. 6, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-2.html>.

⁹⁷ See, e.g., Jess Bravin, Bush Confirms Existence of Secret CIA Prisons, *Wall St. J.*, Sept. 7, 2006, at A3; Bush Justifies CIA Detainee Abuse, *Reuters*, Sept. 7, 2006, available at <http://www.alertnet.org/thenews/newsdesk/HRW/c9e826e4d9838e346af33090f0583e7f.htm>; Ron Hutcheson & Margaret Talev, President Confirms CIA Prisons, *News Trib.*, Sept. 7, 2006, at A01; Tim Golden, Detainee Memo Created Divide in White House, *N.Y. Times*, Oct. 1, 2006; Brian Knowlton, European Reaction Split, *Int'l Herald*

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investigations initiated in Europe regarding secret detention and rendition reacted to President Bush's speech by requesting additional information from countries alleged to have hosted secret prisons.^{10/}

Amnesty and WSLs have reason to believe that the Office of Policy is involved with or has knowledge of these programs and likely possesses additional documents responsive to the Requests. DHS, of which the Policy Office is a component, was established in large part to coordinate the "...vast national network of organizations and institutions involved in efforts to secure our nation."^{11/} According to the DHS website, the DHS' mission is to lead a "unified national effort to secure America," by preventing terrorist attacks and protecting against and responding to threats to the nation.^{12/}

The DHS website explains that the Policy Directorate "strengthens homeland security by developing and integrating Department-wide policies, planning, and programs in order to better coordinate the Department's prevention, protection, response and recovery missions."^{13/} Specifically, the Office of Policy:

Trib., Sept. 7, 2006, available at <http://www.ihl.com/articles/2006/09/07/news/react.php>; Dafna Linzer and Glenn Kessler, Decision to Move Detainees Resolved Two-Year Debate Among Bush Advisers, Wash. Post, Sept. 8, 2006; David Morgan, U.S. Gives Details on CIA Detention Program, Reuters, Sept. 6, 2006; Deb Reichmann, Bush Admits the CIA Runs Secret Prisons, Assoc. Press, Sept. 7, 2006; Jeannie Shawl, Bush Confirms Existence of Secret CIA Prisons for High-Value Terror Detainees, Jurist, Sept. 6, 2006; Mark Silva, Bush Confirms Use of Secret CIA Prisons, Chicago Trib., Sept. 7, 2006; R. Jeffrey Smith & Michael Fletcher, Bush Says Detainees Will be Tried; Confirms Existence of CIA Prisons, Wash. Post, Sept. 7, 2006; Sheryl Gay Stolberg, Threats and Responses: The Overview; President Moves 14 Held in Secret to Guantánamo, N.Y. Times, Sept. 7, 2006; Kevin Sullivan, Detainee Decision Greeted Skeptically, Wash. Post, Sept. 7, 2006, at A17; Chase Squires, Intelligence Director Says CIA Interrogation Program to Continue, Assoc. Press, Sept. 8, 2006.

^{10/} See, e.g., Constant Brand, 11 EU Nations Tied to CIA Prisons, Chicago Tribune, Nov. 29, 2006; Constant Brand, EU Calls on U.S. to Abide by International Law in Treatment of Terror Suspects, Assoc. Press, Sept. 15, 2006; Europe Remains Opposed to Secret CIA Prisons: Council of Europe, Agence Fr. Presse, Sept. 7, 2006; Ingrid Melander, EU Condemns Secret CIA Prisons, Reuters, Sept. 15, 2006; EU tells U.S. to Heed Law with Terror Suspects, Chicago Tribune, Sept. 16, 2006; President Bush's Comments Are "Tangible" Proof of CIA Exactions, Terry Davis Says, Calling for Secret Services to Be Controlled in Europe, Agence Europe, Sept. 9, 2006; Romania, Poland asked to clarify CIA Detention Centres Issues, BBC, Sept. 8, 2006; Jan Silva, EU Parliamentarians to Go to 4 Countries Over Alleged CIA Secret Prisons, Transfers, Assoc. Press, Sept. 11, 2006; Craig Whitlock, European Report Details Flights CIA Aircraft; Polish, Romanian Facilities Cited, Wash. Post, Nov. 29, 2006.

^{11/} See Department of Homeland Security website, available at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0413.xml.

^{12/} See *Id.*

^{13/} Policy Directorate information, available at http://www.dhs.gov/xabout/structure/editorial_0870.shtm last visited on January 25, 2007.

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- “Leads coordination of Department-wide policies, programs, and planning, which will ensure consistency and integration of missions throughout the entire Department.
- Provides a central office to develop and communicate policies across multiple components of the homeland security network and strengthens the Department’s ability to maintain policy and operational readiness needed to protect the homeland.
- Provides the foundation and direction for Department-wide strategic planning and budget priorities.
- Bridges multiple headquarters’ components and operating agencies to improve communication among DHS entities, eliminate duplication of effort, and translate policies into timely action.
- Creates a single point of contact for internal and external stakeholders that will allow for streamlined policy management across the Department.”^{14/}

In sum, the Office of Policy plays an integral role in overseeing policy for most if not all components of the DHS. The involvement of a number of components of DHS in the U.S. government’s anti-terrorism efforts, including the secret transfer, interrogation and detention of individuals, has been alleged and documented in the media and other sources.^{15/}

^{14/} *Id.*

^{15/} For example, U.S. Customs and Border Protection (or its predecessor, the Immigration and Naturalization Service) has been reportedly involved in some capacity with detainees who have been secretly or irregularly apprehended, transferred, or detained. Khaled El-Masri, a German citizen allegedly secretly detained by the U.S. government, was reportedly denied entry into the U.S. by CBP in Atlanta, Georgia, in December 2005. See Letter from U.S. Customs and Border Protection to Ms. Ann Beeson, ACLU: Exhibit H to Declaration of Khaled El-Masri in Support of Plaintiff’s Opposition to the United States’ motion to Dismiss or, in the Alternative, for Summary Judgment, available at http://www.aclu.org/pdfs/safefree/elmasri_decl_exh.pdf. Similarly, the CBP’s own website indicates that the National Targeting Center (NTC, established under the Office of Field Operations) played a role in identifying Jose Padilla, a U.S. citizen detained in the U.S. as an “enemy combatant.” See Linda Kane, A New Team Against Terrorism, Customs and Border Protection TODAY, available at http://www.cbp.gov/xp/CustomsToday/2003/june_july/ntcfinal.xml. Similarly, there is evidence that the U.S. Coast Guard has been involved with secretly or irregularly apprehended, transferred or held detainees. According to the Coast Guard’s website, it is involved with the capture of prisoners of war, the detention of prisoners, and “looking for Al Qaeda terrorists.” See <http://www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/IraqiFreedom.htm> and <http://www.uscg.mil/reservist/mag2004/MAY%2004/WOT.htm>. Additionally, the U.S. Department of Defense has indicated that the Coast Guard is responsible for providing port security and harbor defense at the Guantánamo Bay facility. See U.S. Department of Defense, “Defend America,” available at <http://www.defendamerica.mil/awt/jul2002/awt071702a.html>. There have been repeated allegations that a secret facility existed in Guantánamo Bay to house unregistered detainees, and that this facility did not close until some time in 2004. See, e.g., David Johnson & Neil A. Lewis, Officials Describe Secret C.I.A. Center at Guantánamo Bay, N.Y. Times, Dec. 17, 2004. There is also evidence that specific individuals were or continue to be held at Guantánamo after secret or irregular apprehension, transfer, or detention (e.g. Benyam Mohammed, see . MI6 and

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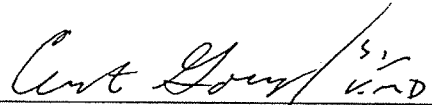
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Under these circumstances, it is unlikely that the Office of Policy does not possess a single document responsive to the Requests. We therefore respectfully request that you conduct a more thorough search of your files and provide a more detailed explanation of your search methods.^{16/}

We look forward to your reply to this appeal within **twenty (20) working days**, as required under 5 U.S.C. §552(a)(6)(A)(ii).

Sincerely,



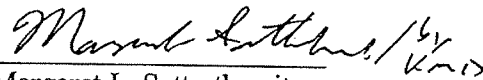
Curt Goering
Deputy Director
Amnesty International USA
5 Penn Plaza
New York, NY 10001
Tel: (212) 807-8400
Fax: (212) 627-1451
E-mail: cgoering@aiusa.org

CIA 'sent student to Morocco to be tortured,' The Observer (U.K.), Dec. 11, 2005, available at <http://observer.guardian.co.uk/international/story/0,6903,1664612,00.html> and most notably the fourteen "high value detainees" formerly held by the CIA in secret facilities transferred to Guantánamo in September 2006. See *supra* notes 8-9.

^{16/} See *Oglesby v. U.S. Dept of the Army*, 920 F 2d 57, 68 (DC Cir. 1990) (the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested).

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Margaret L. Satterthwaite
Washington Square Legal Services, Inc.
Co-Director, International Human Rights Clinic
Faculty Director, Center for Human Rights &
Global Justice
NYU School of Law
245 Sullivan Street
New York, NY 10012
Tel: (212) 998-6657
Fax: (212) 995-4031
E-Mail: margaret.satterthwaite@nyu.edu



Kyle DeYoung
WilmerHale
1875 Pennsylvania Avenue
Washington, DC 20006
Tel: (202) 663-6785
Fax: (202) 663-6363
E-Mail: kyle.deyoung@wilmerhale.com